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1 some actionable legal theory.”” *Shabazz v. Cole*, 69 F. Supp. 2d 177, 185 (D.Mass. 1999).
2 (citations omitted). “Conclusory allegations of law and unwarranted inferences are insufficient to
3 defeat a motion to dismiss.” *Ove v. Gwinn*, 264 F.3rd 817, 821 (9th Cir. 2001).

4 With respect to a *pro se* litigant’s rights to amend his complaint, the Ninth Circuit has held
5 that “unless it is absolutely clear that no amendment can cure the defect, a *pro se* litigant is entitled
6 to notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of the
7 action.” *Lucas v. Dep’t of Corrections*, 66 F.2d 1050, 1055 (9th Cir. 1995) (per curiam); *see also*
8 *Lopez v. Smith*, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000)(en banc).

9 **BACKGROUND**

10 Plaintiff Jacob Cruz (“Cruz”), is an individual suffering from a speech impairment, a
11 learning disability and an attention deficit disorder. Cruz has filed suit against Gregorio Calvo and
12 Rosanne Ada (“Defendant’s”).¹ Cruz claims that Defendants violated certain provisions of the
13 Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973 as amended through 1998 (“RA”)
14 and the Americans with Disabilities Act (“ADA”). He contends that he was denied services due
15 to discrimination as a result of his disabilities.

16 Cruz alleges that in April of 2006 he sought services from Defendants through the
17 Individualized Budgeting Program (“IBP”) as an individual with a disability. Cruz states he was
18 promised services through the IBP program to include funding for his home-based business and
19 housing close to campus (to occur on or about August 16, 2006) in order to further his studies at
20 Guam Community College. Under the Department of Vocational Rehabilitation (“DVR”) he also
21 had an active Individualized Plan for Employment (“IPE”) which was to provide tuition for post-
22 secondary education, purchase of a laptop computer and printer, internet access, maintenance fee
23 at \$150.00 per month and an iConnect cell phone.² Cruz met with DISD personnel on at least
24 eight separate occasions in attempts to obtain services promised. Unsatisfied with the lack of
25 results, Cruz requested a “grievance hearing” to express his concerns. The hearing was held on
26

27 ¹ Gregory Calvo and Rosanne Ada are the deputy director and director (respectively) of the Department of Integrated
28 Services for Individuals with Disabilities (“DISID”).

29 ² Cruz asserts that as of October 12, 2006, DVR was four months delinquent in payments under the IPE contract for a
total of \$600. Further, DVR only provided tuition even though the other services previously mentioned were necessary for him
to be successful academically.

1 October 6, 2006, and both Defendants were present. Cruz asserts that at this hearing he was
2 informed that he was “disqualifi[ed]” from the IBP program. He maintains that his disqualification
3 was founded on an improper basis, namely his disability.

4 Defendants have filed a motion to dismiss pursuant to FED. R. CIV. P. 12 (b)(6) stating Cruz
5 has failed to state a claim with respect to the proposed violations. With respect to the allegations
6 concerning the ADA violations, Defendants assert Cruz has failed to allege any facts to support that
7 1) he qualified for the IBP and 2) that his exclusion from the program was because of his disability.
8 Concerning the RA violations, Defendants contend that Cruz has not alleged any facts to indicate
9 1) that he is otherwise qualified for the benefit or services sought and 2) that he was denied the
10 benefit solely on the basis of his handicap.

11 Defendants also maintain that even if Cruz’s complaint is sufficient to state a claim,
12 compensatory damages are not available because Cruz failed to allege discriminatory intent on the
13 part of Defendants. Finally, Defendants argue that Cruz should be prohibited from seeking relief
14 as he has not complied with the requirements of the Guam Government Claims Act, 5 GCA §§
15 6101, *et. seq.* In addition, by extension they claim that DISID as a government agency is immune
16 from suit as it has not waived its sovereign immunity bestowed by virtue of the Organic act of
17 Guam.

ANALYSIS

19 The ADA³ and RA⁴ provide that “no qualified individual with a disability shall, by reason of such
20 disability, be excluded from participation in or be denied the benefits of the services, programs, or

22 ³ Title II of the ADA, 42 U.S.C. § 12132 states in relevant part:

23 Subject to the provisions of this subchapter, no qualified individual with a disability shall,
24 by reason of such disability, be excluded from participation in or be denied the benefits
25 of the services, programs, or activities of a public entity, or be subjected to discrimination
26 by any such entity.

27 ⁴ The RA establishes a comprehensive federal program aimed at improving the lot of the handicapped. Among its
28 purposes are to “empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and
inclusion and integration into society.” 29 U.S.C. § 701(b)(1). To further these purposes, Congress enacted § 504 of the Act, 29
U.S.C. §§ 794(a). That section provides that:

No otherwise qualified handicapped individual ... shall, solely by reason of his handicap,
be excluded from the participation in, be denied the benefits of, or be subjected to
discrimination under any program or activity receiving Federal financial assistance.

1 activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. §
2 12132; *see also* 29 U.S.C. § 794(a).

3 “[The Ninth Circuit's] interpretation of Title II of the ADA applies equally to Section 504
4 of the Rehabilitation Act.” *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*,
5 179 F.3d 725, 730 (9th Cir.1999). The language of the two statutes is “similarly expansive” and
6 “Congress has directed that the ADA and Rehabilitation Act be construed consistently.”
7 *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir.1997), *cert. denied*, 524 U.S. 937, 118 S.Ct.
8 2340 (1998).

9 Given the similar substance of the ADA and RA, it seems appropriate to address the
10 elements of ADA and RA claims together. To prove a violation of either the ADA Title II or
11 Rehabilitation Act Section 504, the Plaintiff must show that he: (1) was an “individual with a
12 disability”; (2) was either excluded from participation in or denied the benefits of services,
13 programs or activities, or was otherwise discriminated against; (3) was “otherwise eligible” to
14 receive the benefit; (4) the denial of benefits or discrimination was solely by reason of his
15 disability; and (5) the Defendant Directors of DISID receive federal funding (for the Rehabilitation
16 Act claim), or constitute a public entity (for the ADA claim). *See Weinreich v. Los Angeles County*
17 *Metropolitan Transp. Authority*, 114 F.3d 976, 978 (9th Cir.1997) (listing elements for disability
18 discrimination claims under Title II of the ADA and § 504 of the Rehabilitation Act); *Zukle v.*
19 *Regents of the University of California*, 166 F.3d 1041, 1045 (9th Cir.1999) (applying a combined
20 set of elements for plaintiff's disability discrimination claims under Title II of the ADA and § 504
21 of the Rehabilitation Act).

22 Defendants have not disputed either the first or the fifth elements. Therefore, the only
23 outstanding questions are whether Cruz has stated sufficient facts to support that he was denied the
24 benefits of services (under IPE and IBP), that he was otherwise eligible to receive those services
25 and whether such denial was based on his disability.

26 *Services under IBP and IPE.* Regarding IBP services, Defendants contend that Cruz has
27 not supported denial of benefits by failing to identify any “authority expressly told him, or gave him
28 //

1 a document so stating.” Motion at 8.⁵ The court disagrees. Cruz did allege “[i]n this meeting, [of
2 October 6, 2006] this was the first time [Cruz] was handed [d]own a [d]ecision of [d]isqualifying
3 him [f]rom the [IBP].” Complaint at ¶ 15. Cruz previously alleged that those persons present were
4 Defendants, Defendants’ advocate Mr. Edmund Cruz, Fred Burgos (a friend of Cruz) and Cruz
5 himself. Complaint at ¶ 12. Clearly, assuming these facts are true, it is a reasonable inference that
6 the Defendants are the only ones present who could have made such a statement.

7 Defendants assert that Cruz has failed to allege any “factual allegation whatsoever” to
8 establish that he was qualified for the IBP. (Motion at 8). However, Cruz did indicate in his
9 complaint that he applied for the IBP program in April 2006 and subsequently met with DISID on
10 at least eight occasions regarding the IBP. He also asserts that during these meetings DISID
11 “committed and promised that [t]he Individualized [B]udgeting upon it[’]s receiving the [f]unding
12 will disburse the [f]unds” to him. *See* Complaint at ¶ 7. These remarks by DISID affirming Cruz’s
13 qualification for the IBP were again reaffirmed on July 14, 2006 when Cruz was told that he “will
14 [q]ualify [u]nder [t]he Individualized Budgeting Program and [w]ill get [h]ousing as [p]art of [h]is
15 [a]cademic [t]raining [t]o [f]urther his [s]tudies . . .” Complaint at ¶ 8. Further, he was told that
16 housing, furnishings, and some funding for Cruz’s home based business would be paid for under
17 the IBP. These services were to commence “on or about August 16, 2006.” Complaint at ¶ 9.
18 These facts if taken as true, are more than sufficient to support that Cruz was qualified for IBP
19 services.

20 Whether there are sufficient facts alleged to support that the denial of benefits was based
21 solely on his disability is also contested by Defendants. Regarding the IPE and the services therein,
22 it is undisputed that Cruz was qualified to receive certain benefits as contained in the IPE and
23 agreed to by DVR. The issue is really whether he was constructively denied these benefits (that
24 he was told were coming to him) because they were not provided in a timely fashion. Cruz has
25 alleged facts in this regard indicating that Defendants has delayed DVR from providing services

26
27
28 ⁵ Defendant Ada did submit an affidavit asserting that Cruz’s application for IBP has neither been approved nor denied.
However this is a question of fact and factual determinations are not properly before the court on a motion for failure to state a claim
upon which relief can be granted pursuant to Rule 12(b)(6).

1 and complying with the IPE including purchase of a laptop, printer, paying the maintenance fee
2 and providing a cell phone. *See Complaint ¶¶ 13, 14 and 17.*⁶

3 Defendants contend that since IBP services are only available to individuals with disabilities
4 it is necessarily impossible for Cruz to allege any facts that would support this element. The court
5 disagrees. Caselaw suggests that “although Title II of the ADA expressly prohibits discrimination
6 against the disabled, it has been recognized that Congress did not intend to condition the protection
7 of the ADA upon a finding of discrimination; thus, state agency's failure to provide disabled
8 individual with services in the ‘most integrated setting appropriate’ to the individual's needs
9 without a proper justification violates the ADA.” *Cable v. Department of Developmental Services*
10 *of State of Cal.*, C.D.Cal.1997, 973 F.Supp. 937.

11 Disability “discrimination” under the statutes, may differ from traditional ideas of
12 discrimination because the ADA and RA statutes contain their own definitions of discrimination.
13 *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 672 (5th Cir.2004). For example, the Supreme
14 court has recognized that “failure to accommodate persons with disabilities will often have the
15 same practical effect as outright exclusion” or discrimination. *Tennessee v. Lane*, 541 U.S. 509,
16 531 (2004); *see also Swenson v. Lincoln County School Dist. No. 2*, 260 F.Supp.2d 1136, 1144
17 (D.Wyo.2003) (stating that the “[t]hree theories of discrimination” under the statutes are “(1)
18 intentional discrimination; (2) discriminatory impact; and (3) a refusal to make a reasonable
19 modification”).

20 When viewed in this light, assuming Cruz's contentions regarding the underlying
21 circumstances are true, he was determined by the Defendants to be eligible for services of the IPE
22 and IBP and as a result was promised certain benefits and then was subsequently denied. At this
23 juncture, a reasonable conclusion can be drawn that he was denied based on the perceived severity
24 of his disability. This deduction with regard to the IBP, is further supported by the additional
25 documentation provided by Defendants listing the primary criteria for prioritizing applicant
26 consumers in the IBP. *See Motion Exhibit A.*⁷

27

28 ⁶ The court is aware that Cruz is maintaining that internet access was to be provided for use at school and to date is not in place (See Cruz's opposition to Motion at 2) however it is not alleged in the Complaint. The court will allow Cruz leave to amend his complaint in this regard.

⁷ Certainly it would be helpful for Cruz's petition to be more specific. The court will allow Cruz to amend his complaint in order to indicate why he believes Defendants' discrimination is based solely on his disability.

1 *Recovery of Compensatory Damages.* In order to collect monetary damages in a failure to
2 accommodate case, Cruz must prove intentional discrimination, the standard for which is
3 “deliberate indifference.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir.2001).
4 Although the complaint does not utilize the exact words that Defendants were “deliberately
5 indifferent” it does allege facts that support such an allegation. Specifically, that DISID agreed that
6 certain services under the IBP and IPE previously mentioned were necessary and appropriate for
7 Cruz. A statement that these services would be provided and an allegation that the services were
8 not provided in spite of their previous determinations of their necessity and Cruz’s repeated
9 requests that they be provided. These facts reasonably infer some degree of deliberateness beyond
10 that of mere negligence on the part of Defendants.⁸

11 In order to survive a motion for failure to state a claim which will allow him to recover
12 compensatory damages, Cruz must amend his complaint to allege that Defendants intentionally
13 discriminated against him and were “deliberately indifferent” in addition to including factual
14 support for such a claim.

15 *Compliance with the Government Claims Act.* Defendants have made a vague reference
16 to Cruz’s failure to assert compliance with the Government Claims Act (“Act”) as a basis to
17 dismiss. Apparently, the Defendants are contending that Cruz has failed to exhaust his
18 administrative remedies under the Act prior to filing suit. However, the Ninth Circuit has held that
19 there is no exhaustion requirement under either the ADA or the RA. *See Smith v. Barton*, 914 F.2d
20 1330, 1338 (9th Cir.1990) (holding a plaintiff need not exhaust administrative remedies before
21 filing suit under the Section 504 of the Rehabilitation Act) and *Zimmerman v. Oregon Dep’t of
22 Justice*, 170 F.3d 1169, 1177-78 (9 th Cir.1999) (Title II of the ADA incorporates the provisions
23 of the RA which do not require pursuit of administrative remedies). Accordingly, Defendants’
24 claim in this regard fails.

25 *Sovereign Immunity.* It is well settled law in the Ninth Circuit that a state⁹ is not entitled
26 to immunity under Title II of the ADA. *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir.
27

28 ⁸ Cruz may amend with respect to providing additional factual bases, but must amend his complaint to at least include
an allegation of “intentional discrimination” and “deliberate indifference.”

9 ⁹ Guam is specifically included in the definition of the term “State” for purposes of the applicability of the ADA, 42
U.S.C. 12102.

1 2002); *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791, 792-93 (9th Cir. 2004).
2 Likewise it is established precedent that states waive immunity with respect to the RA when they
3 accept federal funds. *See Lovell*, 303 F.3d at 1051); *Phiffer*, 384 F.3d at 793. Here, Cruz has
4 alleged and it is undisputed that DISID accepts federal funds. Therefore, Defendants are not
5 immune from liability in their official capacities under the ADA and RA. Accordingly,
6 Defendants' assertion of sovereign immunity pursuant to the Organic Act, 48 U.S.C. 1421a, is
7 baseless is denied.

8 **CONCLUSION**

9 Although, Cruz's complaint could be more clearly and concisely written, the court finds that
10 it meets the requisite standard to survive the 12(b)(6) challenge with respect to the elements of the
11 ADA and RA claims. The Defendants' motion in that regard is DENIED. However, with respect
12 to the availability of compensatory damages the court finds that Cruz has failed to allege
13 "intentional discrimination" or the intent of "deliberate indifference." Absent such an allegation
14 Cruz's claims for compensatory damages must fail.

15 Accordingly, Cruz is granted leave to amend, file and serve his complaint.¹⁰ Absent an
16 amendment conforming with this court's order, **ALL** causes of action as to Defendants will be
17 dismissed. Cruz shall submit an Amended Complaint by February 20, 2007. The Amended
18 Complaint must be retyped or rewritten in its entirety and may not incorporate any part of the
19 original Complaint (or supporting documentation) by reference.¹¹ Any Amended Complaint
20 submitted by Plaintiff should be clearly designated as such on the face of the document. Cruz
21 should take notice that all causes of action alleged in a complaint which are not alleged in an
22 amended complaint are waived. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546
23 (9th Cir. 1990). Cruz is also free to amend any other aspects of his complaint as previously
24 indicated by the court.

25
26 ¹⁰ Cruz is reminded of this court's order indicating that he may effectuate service on Defendants by placing a copy of the
27 documents in Defendant's court box located in the Clerk's Office and to notify defense counsel of said delivery by telephone.
Defense counsel may serve Cruz at his residence.

28 ¹¹ If Cruz wishes to include the information previously submitted in the original complaint or the supporting documents
submitted via letter (Docket No. 6) he must retype them into his amended complaint or attach the supporting documents to the
Amended Complaint.

The Clerk of Court is directed to enter a judgment of dismissal without prejudice and without further notice to Cruz, if Cruz fails to file an Amended Complaint by February 20, 2007.

WARNING OF POSSIBLE DISMISSAL

Cruz should take notice that if he fails to timely comply with every provision of this Order, or any order entered in this matter, this action will be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *See Ferdik v. Bonzelet*, 963 F2d. 1258, 1260-61 (9th Cir.)(district court may dismiss action for failure to comply with any order of the court), *cert. denied*, 506 U.S. 915 (1992).

10 | SO ORDERED this 28th day of December, 2006.

Frances Tyding Gatewood
FRANCES TYDING CO-GATEWOOD
CHIEF DISTRICT JUDGE